

No. 15274

United States
Court of Appeals
for the Ninth Circuit

CITY NATIONAL BANK, Appellant,

vs.

JOE BLACKARD, doing business as New and
Used Car Motor Repair Shop, Appellee.

Transcript of Record

Appeal from the District Court for the
District of Alaska,
Third Division

FILED

DEC - 3 1956

PAUL P. O'BRIEN, Clerk

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

MOODY AND TALBOT,

341 F. Street,
Anchorage, Alaska,

Attorneys for Appellant,

HARTLIEB, GROH AND RADER,

Box 2068,
Anchorage, Alaska,

Attorneys for Appellee.

In the District Court for the Territory of Alaska
Third Division at Anchorage

No. A-10,845

JOE BLACKARD, dba New and Used Car Motor
Repair Shop, Plaintiff,

vs.

CITY NATIONAL BANK, Defendant.

COMPLAINT

I.

During the inclusive periods shown in Column I, one Ralph Capehart, doing business as Anchorage Freight Lines, delivered to the plaintiff the below described vehicles and requested plaintiff to repair the same. Plaintiff claims a lien upon the said vehicles for labor performed and materials furnished, in the amounts shown in Column II.

	Column I	Column II
(a) One 1942 GMC Truck	Oct. 8, 1954	\$ 752.00
Serial #7221353	to	
Motor #4263560	Dec. 18, 1954	
(b) One 1951 GMC Truck	Sept. 11, 1954	906.00
No. C 1089	to	
	Dec. 20, 1954	
(c) One 1952 Federal	April 10, 1954	1,165.00
Truck	to	
Serial #T 64277588	Dec. 20, 1954	

II.

The said Ralph Capehart was the owner and law-

ful possessor of the aforementioned vehicles and the plaintiff performed labor and furnished materials on the inclusive dates indicated in Column I above at his request.

III.

Ralph Capehart, doing business as Anchorage Freight Lines, named in this complaint, is not made a party to this action, because he is not within the jurisdiction of this Court.

IV.

Plaintiff has demanded from the said Ralph Capehart his just and reasonable charges but the said Ralph Capehart has failed to pay the same or any part thereof.

V.

Plaintiff has a right to possession of said vehicles as provided in Section 26-3-1, ACLA 1949, and a lien as provided in said section. Plaintiff is holding possession of said vehicles for the purpose of maintaining the aforesaid lien, until payment is received.

VI.

Defendant claims some interest in said vehicles by virtue of a chattel mortgage of an unknown date and amount. Defendant has attempted to summarily foreclose said chattel mortgage. Defendant's claim is subject to the lien of plaintiff.

Wherefore, plaintiff demands judgment against defendant as follows:

1. That it be decreed that plaintiff has a lien on

the aforesaid vehicles for the respective amounts shown, which is in the total amount of Two Thousand Eight Hundred and Twenty-Three Dollars (\$2,823.00).

2. That the lien of plaintiff be adjudged prior to the claim or claims of the defendant.

3. That the said vehicles be sold according to law and that the proceeds of said sale be applied to satisfy plaintiff's lien, together with the expenses of sale, and costs of this action.

/s/ JOE BLACKARD,
Plaintiff

/s/ CLIFFORD J. GROH,
Attorney for Plaintiff

[Endorsed]: Filed April 15, 1955.

[Title of District Court and Cause.]

APPEARANCE

City National Bank, defendant in the above entitled action, by its attorneys, Moody and Talbot, enters its appearance in said action and submits itself to the jurisdiction of the above entitled court. Said defendant admits service of the complaint on April 15, 1955.

/s/ RALPH MOODY,
Attorneys for Defendant

Received copy. C. J. Groh.

[Endorsed]: Filed April 28, 1955.

[Title of District Court and Cause.]

ANSWER

Comes now defendant and for answer to plaintiff's complaint, herein admits, denies and alleges as follows:

I.

Defendant not having sufficient information or belief upon which to base an opinion as to the truth or falsity of the allegations contained in Paragraphs I., III., and IV. of plaintiff's complaint, denies each and every allegation therein contained and demands proof thereof.

II.

Defendant in answer to Paragraph II of plaintiff's complaint admits that Ralph Capehart was the owner and lawful possessor of the vehicles mentioned in plaintiff's complaint but denies each and every other allegation therein contained and demands strict proof thereof.

III.

Defendant denies each and every allegation contained in Paragraph V of plaintiff's complaint and in connection with such denial alleges the fact to be that the plaintiff is unlawfully holding possession of said vehicles which have been sold by virtue of a summary foreclosure of chattel mortgage conducted by the U. S. Marshal on the 28th day of March, 1955, at which sale the defendant herein purchased the said vehicles, the subject of this action for the

sum of \$500.00, which bid was the highest and best bid received at said sale conducted by said marshal.

IV.

Defendant admits its claims and interests in said vehicles by virtue of said sale of said vehicles by the U. S. Marshal as alleged in the preceding paragraph of this Answer, and in connection with such admission, alleges the fact to be that defendant Ralph Capehart d/b/a Anchorage Freight Lines executed a chattel mortgage to the City National Bank of Anchorage, plaintiff, on the first day of October, 1953, covering certain vehicles as named in said mortgage and including the three vehicles the subject of this suit as more fully appears from a copy of said chattel mortgage which is attached hereto as Exhibit A and made a part hereof as if fully set forth herein. Defendant further alleges that in accordance with the terms of said chattel mortgage that Ralph Capehart mortgagor therein failed to pay money for which the mortgage was given to secure payment thereof in the sum of \$6,730.00 and by virtue thereof defendant herein caused the power of sale granted to the defendant therein by the said Ralph Capehart to be exercised by the U. S. Marshal and sold as a summary foreclosure of said mortgage in accordance with law on the 28th day of March, 1955, at which time the City National Bank of Anchorage, being the only bidder at said sale, bid in three vehicles, the subject of this suit, for the sum of \$500.00 and received a marshal's bill of sale therefor, a copy of which bill of

sale is attached hereto as Exhibit B and made a part hereof as if fully set forth herein.

Defendant further alleges that its chattel mortgage as aforesaid is a superior lien to that of the plaintiff if the plaintiff has such a lien.

Wherefore City National Bank of Anchorage prays judgment as follows:

That the mortgage of the City National Bank of Anchorage executed on the 1st day of October, 1953, and the subsequent sale thereunder made by the U. S. Marshal be declared to be superior and prior to any interests which the plaintiff may have herein; that the City National Bank of Anchorage be awarded reasonable attorney's fees for defending this action, together with its costs incurred in same.

MOODY & TALBOT,
/s/ By RALPH E. MOODY,
Attorneys for Defendant

Receipt of Copy Acknowledged.

EXHIBIT A
Chattel Mortgage

This Chattel Mortgage, made and entered into this 1st day of October A. D., 1953, by and between Ralph Capehart d/b/a Anchorage Freight Lines, of Anchorage, Alaska, Third Judicial Division, Territory of Alaska, the party of the first part hereinafter called the Mortgagor, and the City Bank of Anchorage, a corporation organized and existing

under and by virtue of the laws of the Territory of Alaska, of Anchorage, Alaska, the party of the second part, hereinafter called the mortgagee, Witnesseth:

That said mortgagor does hereby mortgage to the mortgagee all that certain personal property now at Anchorage, in Anchorage Precinct, Third Judicial Division, Territory of Alaska, and more particularly described as follows, to-wit:

One used 1952 Federal 3½ Ton Tractor Truck, motor number T6427-7588m, Serial number, 156,359; One used 1942 GMC 5 ton Tractor Truck, motor number 4263560, Serial number AC 722-1353; One used 1951 GMC 1½ Ton Tractor Truck, Motor Number A248 124619; Serial number C1089, One only Flat Bed Trailer, Serial number 3185 as security for payment to the said mortgagee of the sum of Six Thousand Seven Hundred Thirty & no/100 (\$6,730.00) Dollars, lawful money of the United States of America, with interest thereon at the rate of eight (8) per cent per annum, payable in monthly installments the last of such installments being due on the 1st day of April, 1954, all according to the tenor and effect of that certain promissory note dated October 1st, 1953, given by said mortgagor to and in favor of said mortgagee.

Said mortgagor promises to pay the said sum of Six Thousand Seven Hundred Thirty & no/100 (\$6,730.00), with interest thereon, at the time and in the manner specified in said promissory note; and the mortgagor expressly agrees with the mort-

gagee that he will, during the continuance hereof, keep the mortgaged property in good condition and repair, and that he will not remove, nor permit to be removed, any part of said property from Anchorage, Alaska, and vicinity without the written consent of the mortgagee being first obtained; that he will not sell or attempt to sell or otherwise dispose of the personal property above described without the consent of the mortgagee being first obtained, unless the balance due under this mortgage shall be paid to the mortgagee as a part of the sale or other transaction; that he will not suffer nor permit any attachment, lien, or encumbrance to be placed against the above described property so as to jeopardize the security of the mortgagee therein; that he will well and truly pay, as the same becomes due, any and all taxes, levied against any of the property covered by this mortgage, whether City, Territorial or Federal, or otherwise, and that he will cause to be executed against loss upon such personal property in an amount at all times at least equal to the amount owed to the mortgagee under the said note and this mortgage, and that he will keep such insurance in full force and effect during the time when any balance due under the terms and conditions of this note and of this mortgage shall be unpaid; that he will cause such insurance to include a loss payable clause providing that in the event of a loss thereunder that the proceeds of such policy shall be paid to the mortgagee and to the mortgagor, as their respective interests may appear.

In the event that the mortgagor shall fail or re-

fuse to pay any taxes or assessments as above mentioned or to keep the property insured as herein provided, or should he suffer or permit any attachments, liens, encumbrances, or charges in violation of the terms of this mortgage, the mortgagee shall be entitled to pay such charges, liens, encumbrances, taxes, attachments, or insurance, and add any sums so paid to the principal sum secured hereby, to be paid and to draw interest as provided in such promissory note, or it may, at its election, treat such non-payment or breach as a default under the terms of this mortgage and may move to foreclose this mortgage as hereinafter provided.

And said mortgagor, hereby declares and warrants to the mortgagee that he is the absolute owner, and in possession of said mortgaged property, and that the same is free and clear of all liens, encumbrances and adverse claims.

It is hereby agreed that if said mortgagor shall fail to make payments of any installment of principal and interest as provided in said promissory note at the time and in the manner therein specified, or if any breach be made of any obligation or promise of the mortgagor, herein contained or here secured, then the whole principal sum unpaid on said promissory note, with interest thereon, shall immediately become due and payable, at the option of the mortgagee; and it may at once proceed to foreclose this mortgage according to law; or it may, at its option, and it is empowered so to do, enter upon the premise where said mortgaged property

may be, and take possession thereof, and advertise and sell the same as provided by Section 22-6-10, Compiled Laws of Alaska, 1949, and the mortgagor, hereby expressly authorized the Marshal to execute the power of sale herein granted to the mortgagee as provided in said Section 22-6-10. On any sale of the herein mortgaged property under the terms of this mortgage, the mortgagee or its representatives or assigns, may in good faith, purchase the property so sold or any part thereof. From the proceeds of any sale made of the said mortgaged property hereunder, the mortgagee may retain all costs and charges incurred by it in the taking or sale of said property.

If suit be brought to foreclose this mortgage, there shall be due from the mortgagor, to the mortgagee, its successors and assigns, a reasonable attorneys fee for the maintenance of said action, which sum is hereby secured.

It is expressly understood and agreed by the parties hereto that the said mortgagor may and shall remain in possession of the property herein mortgaged until the mortgagee shall retake the same or foreclose this mortgage, at its election, upon default by the mortgagor of the terms herein contained.

It is mutually covenanted and agreed that the provisions of this mortgage shall apply to and bind the heirs, executors, administrators and assigns of the respective parties hereto.

In Witness Whereof, the said mortgagor, has

hereunto set his hand and seal on the day and year hereinabove first written.

/s/ RALPH CAPEHART,

Mortgagor

Executed in the presence of:

/s/ ARLEYNE SWITZER

/s/ R. A. KENNARD

United States of America,
Territory of Alaska—ss.

This Is To Certify that on this 1st day of October, 1953, before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn as such, personally appeared Ralph Capehart d/b/a Anchorage Freight Lines, known to me and to me known to be the individual named in and who executed the foregoing instrument and acknowledged to me that he signed and sealed the same as his voluntary act and deed for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and official seal the day and year first above written.

/s/ RUTH MARLAR,

Notary Public in and for the Territory of Alaska:
My Commission expires 12-11-55.

Acknowledgment of Good Faith

United States of America,
Territory of Alaska—ss.

Ralph Capehart d/b/a Anchorage Freight Lines,
the mortgagor, named in the foregoing mortgage,

and R. A. Kennard, being duly authorized to make this acknowledgment of good faith as Vice President of the City Bank of Anchorage, a corporation, and the mortgagee named in the foregoing mortgage, being first duly sworn, each for himself and not one for the other, say: That the aforesaid mortgage is made in good faith, to secure the amount named therein, and without any design to hinder, delay or defraud creditors.

/s/ RALPH CAPEHART

CITY BANK OF ANCHOR-
AGE,

/s/ By R. A. KENNARD,
Vice President

Subscribed and sworn to before me this 1st day of October, 1953.

RUTH MARLAR,
Notary Public in and for Alaska; My Commission
Expires 12-11-55.

EXHIBIT B

Marshal's Bill of Sale

This Bill of Sale, made this 28th day of March, 1955, by me, Fred S. Williamson, United States Marshal, Third Judicial Division, Territory of Alaska

Witnesseth: That pursuant to Section 22-6-10, Alaska Compiled Laws Annotated, 1949, I the said Fred S. Williamson, United States Marshal, Third Judicial Division, Territory of Alaska, have sold to

City National Bank of Anchorage, Anchorage, Alaska, all the right, title and interest of Ralph Capehart d/b/a Anchorage Freight Lines, in and to the following described personal property, to-wit:

One (1) used 1952 Federal 3½ ton tractor truck, Motor No. T6427-7588, Serial No. 156359;

One (1) used 1942 GMC 5 Ton Tractor Truck, Motor No. 4263560, Serial No. Ac722-1353;

One (1) used 1951 GMC 1½ ton Tractor Truck, Motor No. A248 124619, Serial No. C1089.

Now Therefore, I, the said Fred S. Williamson, United States Marshal, Third Division, Territory of Alaska, do grant unto the said City National Bank of Anchorage, all the right and title of Ralph Capehart, d/b/a Anchorage Freight Lines in and to the hereinabove described property.

In Witness Whereof, I have hereunto set my hand and seal the day and year first hereinabove written.

[Seal]

FRED S. WILLIAMSON,

United States Marshal,

/s/ By DAVID A. DREW,

Deputy United States Marshal

United States of America,
Territory of Alaska—ss.

This Is to Certify that on this 28th day of March, 1955, before me the undersigned, a Notary Public in and for Alaska, duly commissioned and sworn as such, personally came David A. Drew, known to me and known to be the particular individual described in and who executed the foregoing instrument and

he acknowledged that he signed and sealed the same freely and voluntarily for the uses and purposes therein stated.

Witness my hand and notarial seal the day and year last above written.

[Seal] /s/ By AGNES H. HEALY,
Notary Public in and for Alaska. My commission
expires: 10-5-57.

[Endorsed]: Filed May 4, 1955.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes now the defendant above named in the above entitled action and moves the Court to enter judgment herein for the defendant against plaintiff, Joe Blackard, d/b/a New and Used Car Motor Repair Shop, for the reason that there is no genuine issue of fact as to the priority of the City National Bank of Anchorage, defendant herein, over the claim of the plaintiff herein. This motion is based upon the records and files herein and Rule 56 of the Federal Rules of Civil Procedure.

Dated this 10th day of May, 1955.

MOODY & TALBOT,
/s/ By RALPH E. MOODY,
Attorneys for Defendant

Notice of Motion for Summary Judgment

To: Clifford Groh, Attorney for the plaintiff, Joe Blackard:

Please take notice that the undersigned will bring the above motion on for hearing before this Court on the 27th day of May, 1955, at 10:00 o'clock in the forenoon, on that day, or as soon thereafter as counsel can be heard.

MOODY & TALBOT,
/s/ By RALPH E. MOODY,
Attorneys for Defendant,

Receipt of Copy Acknowledged.

[Endorsed]: Filed May 11, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF RALPH E. MOODY

United States of America
Territory of Alaska—ss

Ralph E. Moody, being first duly sworn on his oath, deposes and says:

That he is attorney for the defendant, City National Bank of Anchorage, herein, and makes said affidavit on behalf of said defendant.

On the 1st day of October, 1953, the defendant accepted a mortgage from Ralph Capehart d/b/a Anchorage Freight Lines covering the three vehicles, the subject of this suit, which are set out in Paragraph I of the plaintiff's complaint; that

thereafter on the 1st day of October, 1953, City National Bank of Anchorage recorded said mortgage in accordance with Chapter 124 Session Laws of Alaska 1951; that thereafter on the 17th day of March, 1954, the City National Bank of Anchorage was issued by the Territory of Alaska, certain certificates of title showing the City National Bank of Anchorage as lien holders of said vehicles, copies of which certificates of title are attached hereto and marked Exhibits A, B, and C, respectively, as pertains to the above described vehicles in Paragraph I of plaintiff's complaint; thereafter the City National Bank of Anchorage exercised its power of sale in accordance with said chattel mortgage and directed the U. S. Marshal at Anchorage, Alaska, to sell the same in accordance with Law; that thereafter on the 28th day of March, 1955, at 10:00 a.m., the U. S. Marshal at Anchorage, Alaska, sold the three vehicles, the subject of this suit, to the City National Bank for the sum of Five Hundred Dollars (\$500.00), as more fully appears from the pleading on file in this action.

/s/ RALPH E. MOODY.

Subscribed and sworn to before me this 11th day of May, 1955.

[Seal] /s/ VIRGINIA M. OGDEN,
Notary Public in and for Alaska. My Commission
expires December 20, 1958.

EXHIBIT A

Alaska Certificate of Title

Ralph Capehart, d/b/a Anchorage Freight Lines
126 N. 3rd St., Anchorage, Alaska

Title No.—D 101780

Year and Make—1942 GMC Truck Tractor

Motor No.—

Serial No.—AC 722 1353

Unladen Weight—10,800

Used—X

Date Issued—3/17/54

Lien File No.—29507

Date of Lien—10/1/53

Nature of Lien—CM

Amount—6730.00

First Lien Holder—City National Bank of Anchorage, 5th and E, Anchorage, Alaska.

/s/ K. F. DEWEY

EXHIBIT B

Alaska Certificate of Title

Ralph Capehart, d/b/a Anchorage Freight Lines
126 N. 3rd St., Anchorage, Alaska

Title No.—D 102968

Year and Make—1951 GMC

Type—Trctr Trk

Serial No.—C1089

Unladen Weight—7300

Used—X

Date Issued—3/23/54

Lien File No.—29507

Date of Lien—10/1/53

Nature of Lien—CM

Amount—6730.00

First Lien Holder—City National Bank, 5th & E, Anchorage, Alaska.

/s/ K. F. DEWEY

EXHIBIT C

Alaska Certificate of Title

Ralph Capehart, d/b/a Anchorage Freight Lines
126 N. 3rd St., Anchorage, Alaska

Title No.—D 101781

Year and Make—1952 Federal Type 3½ T. Truck

Serial No.—156 359

Unladen Weight—8555

Used—X

Date Issued—11/12/54

Lien File No.—29507

Date of Lien—10/1/53

Nature of Lien—CM

Amount—\$6730.00

First Lien Holder—City National Bank, Box 1286,
Anchorage, Alaska

/s/ K. F. DEWEY

[Endorsed]: Filed May 11, 1955.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO SUMMARY
JUDGMENT

United States of America

Territory of Alaska—ss.

Clifford J. Groh, being duly sworn, deposes and
says:

1. He is attorney for the plaintiff, Joe Blackard,
doing business as New and Used Car Motor Repair
Shop, and has personal knowledge of the facts
herein;

2. On the inclusive dates shown in the complaint
plaintiff performed labor and furnished materials
on certain vehicles of one Ralph Capehart.

3. The plaintiff, on February 17, 1955, which is within ninety days after the labor was last performed, filed a lien in the office of the U. S. Commissioner and ex-Officio Recorder, a copy of which lien is hereto annexed as "Exhibit A."

4. Plaintiff has never relinquished possession of the trucks named in the complaint and still retains possession thereof and intends to retain possession thereof until payment is received. On March 10, 1955, plaintiff posted a Notice of Sale of the three trucks mentioned in the complaint which notices were posted in accordance with Alaska Statutes, Section 26-3-1.

5. The aforesaid Notices of Sale stated that unless the just and reasonable charges of the plaintiff were paid by March 28, 1955, at 9:00 a.m. the trucks would be sold to the highest bidder.

6. On March 28, 1955, at 9:00 a.m. a sale was held by the plaintiff and the trucks were sold to him for his charges.

7. The defendant, through the United States Marshal, endeavored to have a sale on March 28, 1955, at 10:00 a.m., which sale was purportedly held.

8. On April 15, 1955, plaintiff commenced this suit to foreclose his lien.

9. Plaintiff has never relinquished possession of the aforesaid vehicles.

10. The chattel mortgage of the defendant expired by its terms April 1, 1954. The defendant

permitted one Ralph Capehart to stay in possession of the aforesaid vehicles.

/s/ CLIFFORD J. GROH,
Attorney for Plaintiff.

Subscribed and sworn to before me this 16th day of June, 1955.

[Seal] /s/ GORDON W. HARTLIEB,
Notary Public in and for Alaska. My Commission
Expires May 18, 1959.

EXHIBIT A

Notice of Lien Upon Chattels for Labor and Material Expended

Joe Blackard d/b/a New and Used Car Motors Repairs Shop, vs. Ralph Capehard d/b/a Anchorage Freight Lines.

Notice is hereby given that Joe Blackard d/b/a New and Used Car Motor Repairs Shop claims liens on the following described motor vehicles:

1950 Diamond T Truck—Serial No. #910 NO 191

1952 Federal—Serial No. T64277588

1942 GMC—No. 7221353-4263560

1951 GMC—No. C1089

for, and account of labor, skill and materials expended upon said vehicle; that the name of the owner, or reputed owner, is Ralph Capehart d/b/a Anchorage Freight Lines; that the said labor, skill and materials were expended by the claimant so named above between the dates shown opposite the respective vehicles below:

1950 Diamond T Truck—Serial No. #910 NO 191—December 1 and December 16, 1954 inclusive

1952 Federal—Serial No. T4277588—April 10,
1954 and Dec. 20, 1954

1942 GMC—No. 7221353-4263560 — October 8,
1954

1951 GMC—No. C1089—September 11, 1954 and
December 20, 1954

and the rendition of the labor, skill and materials
so expended by the claimant above named was
closed on the last date shown opposite the indi-
vidual vehicles listed above; that the amount claim-
ant demands for said labor, skill and materials so
expended is \$3866.50; that no part thereof has been
paid, and that there is now due and remaining un-
paid thereon, after deducting all just credits and
offsets, the sum of \$3866.50, in which amount he
claims a lien upon said property. Claimant has pos-
session of the vehicles.

/s/ JOE BLACKARD.

United States of America

Territory of Alaska—ss.

I, Joe Blackard, being first duly sworn, on oath
say that I am the claimant named in the foregoing
claim; that I have read the same, and know the
contents thereof, and believe the same to be true.

/s/ JOE BLACKARD.

Subscribed and sworn to before me this 17th day
of February, 1955.

/s/NORA BOSWELL,

Notary Public for Territory of Alaska. My Com-
mission Expires January 26, 1956.

[Endorsed]: Filed June 17, 1955.

[Title of District Court and Cause.]

STIPULATION

Whereas Joe Blackard d/b/a New and Used Car Motor Repair Shop, plaintiff herein, has instituted suit against the City National Bank of Anchorage, defendant herein, claiming a lien on certain vehicles for labor performed and materials furnished in an amount shown in the plaintiff's complaint on file herein; and

Whereas, defendant prior to the filing of the above entitled cause on the 28th day of March, 1955, purchased said vehicles at a Marshal's Sale by virtue of a chattel mortgage foreclosure; and

Whereas, the rights and interests of the respective parties, plaintiff and defendant herein, are now at litigation in this cause; and

Whereas, it is the desire of the plaintiff and defendant to sell the three vehicles listed in said complaint as expeditiously as possible for their reasonable value in order to keep the vehicles from depreciating in value;

Now therefore, for and in consideration of the following agreements to be kept and performed by the respective parties hereto, it is mutually agreed:

1. That City National Bank of Anchorage shall have the right to sell each of the vehicles listed in Paragraph I of plaintiff's complaint in this action for and at the highest price that can be obtained, and that upon the sale of said vehicles by the City National Bank of Anchorage, the plaintiff who now has possession of the same will release the same to

the buyer upon receiving written statements from the City National Bank of Anchorage that the purchase price agreed upon between the bank and the buyer or buyers has been paid to the bank.

2. Plaintiff agrees to deliver said vehicles to the buyer or buyers without any charge whatsoever other than the purchase price paid by the buyer or buyers to the City National Bank of Anchorage.

3. Plaintiff agrees that the vehicles at the time this stipulation was entered into have all their component parts and further agrees that he will not remove any parts from said vehicles or substitute or interchange any parts of the vehicles.

4. Plaintiff further agrees that the vehicles until sold by the Bank and delivered to the buyer or buyers shall be kept and maintained at the expense of the plaintiff, and that he will not allow the same to be pilfered or in any manner damaged.

5. Defendant agrees that all moneys received from the buyer or buyers in connection with the sale of the vehicles will be placed in escrow at the City National Bank of Anchorage for the benefit of the parties to this suit to be paid to the party prevailing in this action upon the final determination of the Court, provided, however, that should the City National Bank of Anchorage prevail in this action and be determined to be the rightful owners of the vehicles, then and in that event, the City National Bank of Anchorage agrees to pay to the plaintiff the following:

\$90.00 for storage of the 1942 GMC Truck

90.00 " " " " 1951 GMC Truck

135.00 for storage of the 1952 Federal Truck upon the final determination of said case by the Court in the Bank's favor.

In the event that the plaintiff shall prevail in this action, then and in that event only, all moneys received from the buyer or buyers for the sale of said vehicles by the bank and placed in escrow shall be distributed as follows:

First, to the payment of the sum set forth in plaintiff's complaint; and

Second, the balance, if any, shall be turned over to the City National Bank of Anchorage as the sole property of said bank, in which event the Bank shall not be liable to plaintiff for any storage charges whatsoever for any of the vehicles.

6. It is specifically understood and agreed that the agreement to pay storage as hereinbefore set forth by the City National Bank of Anchorage in the event it shall prevail in this suit shall constitute a total amount that the bank shall be liable to plaintiff for storage and/or care of said vehicles regardless of how long the same shall be in the possession of and stored by plaintiff.

7. The City National Bank of Anchorage in connection with the sale of any or all vehicles agreed to be sold, agrees to consult with the plaintiff relative to the Sale Price prior to completing the sale, and in that event, if in the opinion of the plaintiff that the price which the bank proposes to sell the said vehicles is not a fair price, then and in that event, the sale shall not be completed

for a period of 24 hours from the time the plaintiff is notified in order that the plaintiff may attempt to obtain a buyer at a higher figure; however, in the event that the plaintiff does not obtain a better offer within 24 hours after he has been notified of the proposed price by the buyer or buyers, then and in that event, the Bank shall have the right to sell the vehicles in question for the price offered by the respective buyer or buyers.

8. With reference to Paragraph 4 wherein plaintiff agrees to keep and maintain the vehicles and not allow them to be pilfered or damaged in any manner, it is mutually agreed that the plaintiff in order to protect himself against such pilfering and damages, is authorized to obtain the necessary insurance to protect himself against such hazards and that in the event that the plaintiff shall prevail in the action now pending, the costs of obtaining the insurance shall be borne by the plaintiff; however, in the event that the bank shall prevail in this action, then and in that event, the Bank shall reimburse the plaintiff for the necessary costs of obtaining insurance to protect against hazards enumerated in Paragraph 4, upon the plaintiff delivering to the Bank the policies of insurance issued to cover such hazards.

9. It is understood and agreed that the City National Bank of Anchorage has in its possession the Marshal's Bills of Sale covering the three vehicles in question and listed on the plaintiff's complaint and that it will deliver the necessary Bills of Sale on the vehicles sold to the buyer or buyers in ac-

cordance with this stipulation, that the plaintiff shall thereafter have no right, title or interest in the vehicles but his rights shall be subrogated to the money received for said vehicles which is to be retained in escrow as set forth above.

10. This stipulation is executed for and on behalf of the plaintiff, Joe Blackard by his attorney, Clifford J. Groh, and for and on behalf of the defendant, City National Bank of Anchorage, by its attorney, Ralph E. Moody, and the same shall be binding upon the plaintiff and defendant alike as though the same were executed in person by the plaintiff and defendant's authorized officers.

Dated at Anchorage, Alaska, this 29th day of June, 1955.

JOE BLACKARD, d/b/a NEW AND
USED CAR MOTOR REPAIR
SHOP,

/s/ By CLIFFORD J. GROH,

His Attorney.

CITY NATIONAL BANK OF
ANCHORAGE,

/s/ By RALPH E. MOODY,

Its Attorney.

[Endorsed]: Filed June 30, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for hearing on a Motion for Summary Judgment, and

Hartlieb, Groh and Rader, through Clifford J. Groh, appeared for plaintiff, and Moody and Talbot, appeared for the defendant, City National Bank, and the Court having duly considered the evidence and being fully advised in the premises now finds the following:

Findings of Fact

I.

During the inclusive periods shown in Column I, one Ralph Capehart, doing business as Anchorage Freight Lines, delivered to the plaintiff the below described vehicles and requested plaintiff to repair the same. Plaintiff claims a lien upon the said vehicles for labor performed and materials furnished, in the amounts shown in Column II.

	Column I	Column II
(a). One 1942 GMC Truck Serial #7221353 Motor #4263560	Oct. 8, 1954 to Dec. 18, 1954	\$752.00
(b). One 1951 GMC Truck No. C 1089	Sept. 11, 1954 to Dec. 20, 1954	\$906.00
(c) One 1952 Federal Truck, Serial #64277588	April 10, 1954 to Dec. 20, 1954	\$1,165.00

II.

The said Ralph Capehart was the owner and lawful possessor of the aforementioned vehicles and the plaintiff performed labor and furnished materials on the inclusive dates indicated in Column I above at his request.

III.

Ralph Capehart, doing business as Anchorage Freight Lines, named in this complaint, is not made

a party to this action, because he is not within the jurisdiction of this Court.

IV.

Plaintiff has demanded from the said Ralph Capehart his just and reasonable charges, but the said Ralph Capehart has failed to pay the same or any part thereof.

V.

Plaintiff has a right to possession of said vehicles as provided in Section 26-3-1, ACLA 1949, and a lien as provided in said section. Plaintiff is holding possession of said vehicles for the purpose of maintaining the aforesaid lien, until payment is received.

VI.

Defendant claims some interest in said vehicles by virtue of a chattel mortgage dated October 1, 1953. Defendant's claim is subject to the lien of plaintiff.

VII.

Plaintiff, in accordance with Section 26-3-1, ACLA, 1949, scheduled a sale of said vehicles to satisfy his lien for 9:00 a.m., March 28, 1955.

VIII.

Defendant scheduled a Marshal's Sale under the summary foreclosure provisions of his chattel mortgage for 10:00 a.m., March 28, 1955.

IX.

Plaintiff has not delivered the vehicles to the

U. S. Marshal, but has retained possession of the same.

Conclusions of Law

From the foregoing facts, the Court concludes:

I.

Plaintiff is entitled to judgment against Ralph Capehart in the amount of Two Thousand Eight Hundred and Twenty-Three Dollars (\$2,823.00), together with interest thereon at the rate of six per cent (6%) per annum from the date judgment is entered, together with costs of suit incurred herein, and a reasonable attorney's fee.

II.

Plaintiff has a lien on the hereinafter described personal property for all of said sum:

(1) 1942 GMC Truck, Serial No. 7221353, Motor No. 4263560

(1) 1951 GMC Truck, No. C 1089

(1) 1952 Federal Truck, Serial # T 64277588

III.

The lien of plaintiff is prior to and superior to that of Defendant City National Bank.

IV.

Let judgment be entered accordingly.

Dated this 16th day of June, 1956.

/s/ J. L. McCARREY, JR.

District Judge.

[Endorsed]: Filed June 16, 1956.

In the United States District Court for the District
of Alaska, Third Judicial Division
No. A-10,845

JOE BLACKARD, d/b/a NEW AND USED
CAR MOTOR REPAIR SHOP,
Plaintiff,

vs.

CITY NATIONAL BANK, Defendant.

JUDGMENT

The above-entitled cause came on regularly for hearing on a Motion for Summary Judgment, and Hartlieb, Groh and Rader, through Clifford J. Groh, appeared for plaintiff, and Moody and Talbot, appeared for the defendant, City National Bank, and the Court having duly considered the evidence and having filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith;

Now, therefore, by reason of the law and findings aforesaid;

It is hereby ordered, adjudged and decreed:

I.

That the amount due the plaintiff, Joe Blackard, from the defendant, Ralph Capehart, is the sum of Two Thousand Eight Hundred Twenty-Three and 00/100 Dollars (\$2,823.00), with interest thereon at the rate of six per cent (6%) per annum from the date of this Judgment, and the costs in the amount of Twenty-Seven and 00/100 Dollars (\$27.00), and a reasonable attorney's fee in the amount of Rule 25.

II.

Plaintiff Joe Blackard has a lien upon the hereinafter described property for all of said sum:

- (a). (1) 1952 GMC Truck, Serial #7221353, Motor #4263560
- (b). (1) 1951 GMC Truck, No. C-1089
- (c). (1) 1952 Federal Truck, Serial #T64277588

III.

That plaintiff's lien is prior to and superior to that of defendant City National Bank.

IV.

That the above described property, or so much thereof as may be necessary to sell, be sold at public auction in the manner prescribed by law, and any party to this action may be a purchaser at such sale.

V.

That the proceeds of said sale shall be applied first, to the payment of the costs of sale; secondly, to the payment to the plaintiff and the total amount due under this Judgment; and if there be any surplus remaining, the same shall be paid to the defendant, City National Bank.

Let execution issue.

Dated this 16th day of June, 1956.

/s/ J. L. McCARREY, JR.,

District Court Judge.

Entered Journal No. G46, Page No. 282, June 16, 1956.

[Endorsed]: Filed June 16, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Clifford J. Groh, Hartlieb, Groh & Rader, Attorneys at Law, and Joe Blackard, Plaintiff.

Notice is hereby given that the defendant herein, City National Bank, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the Summary Judgment entered herein granting the plaintiff's lien priority over the mortgage lien of the defendant, City National Bank; which judgment was filed of record on the 16th day of July, 1956.

Dated at Anchorage, Alaska, this 22nd day of June, 1956.

MOODY & TALBOT,

/s/ By RALPH E. MOODY,

Attorneys for defendant, City
National Bank,

Receipt of Copy Acknowledged.

[Endorsed]: Filed June 25, 1956.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, Wm. A. Hilton, Clerk of the above-entitled Court, do hereby certify that pursuant to (1) Rule 10(1) of the Rules of the United States Court of Appeals, Ninth Circuit, (2) Rules 75(g) and 75(o) of the Federal Rules of Civil Procedure, and (3) the designations of counsel, I am transmitting here-

with the original papers in my office dealing with the above-entitled action.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals, Ninth Circuit, San Francisco, California, from judgment filed and entered in the above-entitled action by the above-entitled Court on June 16, 1956.

Dated at Anchorage, Alaska, this 16th day of August, 1956.

[Seal] /s/ WM. A. HILTON,
Clerk.

[Endorsed]: No. 15274. United States Court of Appeals for the Ninth Circuit. City National Bank, Appellant, vs. Joe Blackard, doing business as New and Used Car Motor Repair Shop, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed: September 4, 1956.

Docketed: September 14, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth District.

In the United States Court of Appeals
for the Ninth Circuit
No. 15274

CITY NATIONAL BANK, Appellant,

vs.

JOE BLACKARD, d/b/a NEW AND USED
CAR MOTOR REPAIR SHOP,
Appellee.

STATEMENT OF POINTS

Appellant, City National Bank, submits the following statement of points on which it intends to rely on its appeal:

1. The Court erred in denying motion for summary judgment of Appellant, City National Bank as filed on May 11, 1955.

2. The Court erred in granting the Appellee, Joe Blackard, d/b/a New and Used Car Motor Repair Shop, a summary judgment in the absence of any motion on the part of the Appellee for a summary judgment.

3. The Court erred in holding that the Appellee's common law lien, based upon possession of the property described in the complaint, was superior to the prior recorded mortgage of the Appellant, City National Bank.

4. The Court erred in granting judgment to the Appellee against the defendant Ralph Capehart

since there had been no personal service or substituted service on the defendant Ralph Capehart by publication of summons or otherwise.

5. The Court erred in granting the Appellee's lien as established by Sections 26-3-1 and 26-3-5, Compiled Laws of Alaska 1949, over the lien of the Appellant City National Bank as established by Chapter 124, Session Laws of Alaska 1951.

Dated at Anchorage, Alaska this 21st day of September, 1956.

MOODY & TALBOT,
/s/ By RALPH E. MOODY,
Attorneys for Appellant, City
National Bank.

[Endorsed]: Filed September 24, 1956. Paul P. O'Brien, Clerk.

